TONG HING TIMBER INDUSTRIES SDN. BHD.

v.

TIMBCO SDN. BHD.

HIGH COURT MALAYA, MALACCA
WAN YAHYA J
[CIVIL SUIT NO. 81/80]
1 FEBRUARY 1984

CIVIL PROCEDURE: *Application for summary judgment - Order 14 - Whether triable issues raised - Documents filed in the course of proceedings - Whether could be relied on; withdrawal from interpleader proceedings - Return of goods - Whether admission by conduct.*

The defendant obtained an O. 14 judgment against Harga Sawmill and Timber Products Sdn. Bhd. (the judgment debtor) from the Senior Assistant Registrar (SAR). They commenced execution proceedings and seized goods found at the judgment debtor's registered premises. The plaintiff claimed that all the goods seized as belonging to their company by virtue of an agreement between them and the judgment debtor executed shortly before the judgment against the latter was obtained. In the mean time, the judgment debtor had taken up their case before the Judge, who decided that the SAR should have assessed the damages before granting leave to sign the final judgment, and accordingly ordered the case to be remitted to SAR for assessment of damages. The defendant withdrew from the inter-pleader summons. The plaintiff had already commenced action in detinue and for damages against the defendant in respect of the goods. The Judge ruled that the question of ownership and right of possession of the goods should be determined at a full trial of the suit for detinue rather than by way of trial by affidavits. The plaintiff nevertheless filed proceedings for summary judgment under O. 14.

Held:

[1] The defendant had successfully raised arguable issues regarding the plaintiff's claim of ownership and right to immediate possession of the goods. All the defendant need do to restrain an O. 14 application is to raise a reasonable issue as to fact or law regarding the plaintiff's right to judgment.

[2] The defendant were entitled to rely on the various sworn documents that had been filed in the course of the proceedings as well as the statement of defence itself as they formed part of the records of proceedings. Unless the affidavits were inherently unreliable, self-contradictory, inadmissible or irrelevant, they could not to be rejected on the ground merely of disbelief of their contents.

[3] The defendant's withdrawal from the interpleader proceedings and their unconditionally returning the goods to the plaintiff did not constitute an admission by conduct that the goods belonged to the plaintiff. The defendant had been forced to withdraw and to surrender the goods on the Judge remitting the case with the judgment debtor for assessment of damages before the SAR.

Cases referred to:

Moore v. Assignment Courier [1977] 1 WLR 638
Jacobs v. Booth Distillatory Company [1901] 85 LT 262
Syarikat Bunga Raya Timor Jauh Sdn. Bhd. v. Tractors Malaysia Bhd. [1980] 2 MLJ 127

Legislation referred to:

Rules of the High Court 1980, O. 14

For the plaintiff/applicant - Haji A.K. Bashir; M/s. Bashir & Co.
For the defendant/respondent - Jeniffer N.F. Cheong; M/s. Mah-Kok & Din

JUDGMENT

Wan Yahya J:

The order we are about to make arises out of an application for summary judgment filed by the plaintiff in Malacca Civil Suit No. 81/80. On 14 February 1980 Timbco Sendirian Berhad, the defendant in this application, obtained an O. 14 judgment for RM173,817.80 against Harga Sawmill and Timber Products Sendirian Berhad (hereinafter referred to as the judgment debtor) from the Senior Assistant Registrar in Kuala Lumpur High Court Civil Suit No. C179/79. By a writ of execution dated 12 June 1980 they commenced execution proceedings against the judgment debtor at its business premises at 7 mile-stone Jalan Muar, Telok Mas, Malacca.

The defendant accompanied by the bailiff proceeded to the judgment debtor's registered premises which comprised of a fenced compound with a prominent sign-board displaying the names of Harga Sawmill at the entrance. Within the enclosed premises they found quantities of logs and wood products and inside the smaller of the two offices within the fenced compound they came across a small signboard bearing the name of Tong Hing Timber Industries Sendirian Berhad (the plaintiff's company) resting unsecured on an air-conditioner. There are conflicting allegations between the parties in their various affidavits on the mode of-seizure. The plaintiff said they protested against the seizure and claimed that the goods belonged to them whereas the defendant denied any objection to the execution at this stage. Anyhow, an objection subsequently lodged as evidence by the letters passing between the parties and as stated in their affidavits. In short the plaintiff claimed all the goods seized in execution within the fenced compound as goods belonging to their company and in support of this claim they produced an agreement between their company and the judgment debtor executed shortly before the judgement was obtained against them in the Kuala Lumpur suit. They claimed that by virtue of the agreement they have the entire use of the premises and machines in the premises and that all the wood products found therein belonged to them.

In the meantime the judgment debtor took his case up again before the Judge. The learned Judge whilst confirming the merits for judgment against the judgment debtor ruled that the Senior Assistant Registrar should have assessed the damages in accordance with the terms of the contract before granting leave to sign the final judgment. His Lordship accordingly ordered the case to be remitted to the SAR for assessment of damages. The outcome of this judgment, therefore, left the defendant who was in the midst of execution proceedings with no authority to proceed further, at least until such time when damages could be assessed. The defendant therefore had no other option except to withdraw from both the execution and the interpleader proceedings.

On 20 August 1983 Counsel for the defendant accordingly withdrew from interpleader summons and this Court recorded no order but allowed costs to be taxed against him. I have adopted this course because by that time the plaintiff had already commenced action in detinue and damages against the defendant in respect of the same goods. I was and still am of the view that the proper venue for the determination of ownership and the right to possession should be at the full trail of Civil Suit No. 81/80 for detinue when the conflicting claim of the parties can be more properly and fully adjudicated rather than by a way of trial by affidavits.

The plaintiff seemed to have accepted this ruling but soon after they filed proceedings for summary judgment i.e. the present application. In their supporting affidavit for the O. 14 application the plaintiff stated that the defendant did not have any defence and the defendant in turn objected to the application on the ground of triable issues to be determined by this Court.

In order to verify the plaintiff's assertion that the defendant has no defence it is imperative that we first consider whether the plaintiff had established his case in detinue. The tort of detinue consists of two elements, namely, wrongful detention and refusal to return such goods after demand. To succeed the plaintiff must first prove that he was entitled to immediate possession of goods seized followed by the defendant's wrongful refusal and continued retention of the goods after demand had been made by him. There are three options available to the plaintiff in pursuing his claim. Firstly, he may, without asking for the return of the goods, ask for the payment of their value and damages; secondly, he may ask for the return of the goods or alternatively their value and damages; and thirdly, the return of the goods seized and damages for wrongful detention. The plaintiff in this case seeks the second remedy i.e., the return of the goods seized or their value and damages.

In respect of the first element i.e., the right to possess, the plaintiff relied on a stack of invoices which they say established clearly that they were owners of the goods and therefore were entitled to immediate possession. Next, they claimed that by withdrawing from the interpleader proceedings and unconditionally returning the goods to them, the defendant had impliedly acknowledged the plaintiff's right to possession.

The defendant disputes these averments. They raised the following issues. To start with they pointed out that the documents produced by the plaintiff bore the plaintiff's name as well as the judgment debtor's name thereby giving rise to the conflicting issue as to ownership. Next, they referred to the variations between the list of items seized and the ones claimed by the plaintiff; thirdly, they alleged collusion by the judgment debtor and the plaintiff, as the judgment debtor had written to the Malaysian Timber Industries Board stating that they were actively engaged in export trade shortly before seizure; that one of the directors of the judgment debtors's company had deposed in his affidavit in support of his application for stay of execution that the Harga Mills had many outstanding contracts to the extent of 3,000 tons; and that they had at that time in their employment 50 workers. Fourthly, the defendants in their affidavit disclosed that the judgment debtor had in an attempt to stop the execution offered the defendants RM40,000. This they contend is consistent with the judgment debtor's interest in the goods. Fifthly, they contend that the plaintiff made no objection at the time of the seizure. Sixthly, they challenged the authenticity of the invoices produced by the plaintiff as some relate to purported transaction before the incorporation of the plaintiff company and they further questioned the identity of the logs in relation to the documents produced and suggested the unlikelihood of the same logs remaining untransacted on the same spot over a period of three years.

The issues raised by the judgment creditor are by no means imaginary or wild accusations. Some are apparent on sight of the documents themselves; some are borne out by sworn statements from responsible persons whilst others are based on inferences from various provable circumstances.

These issues relate to disputable matters pertaining to authenticity of the documents produced by the plaintiff; fraud and collusion between the plaintiff and the judgment debtor; inconsistent conduct of the plaintiff and the conflicting facts in plaintiff's affidavits. To the same extent the defendant also disputed the very basis on which the plaintiff's claim was

based i.e., ownership and right to immediate possession of the goods. These issues were not contained in one single affidavit in reply but are discernible from the various sworn documents that have been filed in the course of these proceedings as well as from the statement of defence itself.

In my opinion the defendant is entitled to rely on these documents as they from part of the records of proceedings. No doubt the issues are presented in the form of affidavits but unless these affidavits are inherently not reliable, self-contradictory, inadmissible or irrelevant these affidavits cannot be rejected due to mere disbelief of their contents. (See *Moore v, Assignment Courier* [1977] 1 WLR 638).

Now reverting to the suggestion of the defendant's implied admission by conduct, I feel bound to say, in all fairness to the parties that the defendant did not even for a moment admit the goods belonged to the plaintiff. They were compelled to withdraw from the execution by the unexpected turn of events when the Judge by remitting the case for assessment of damages before the SAR had in effect retrograded the execution proceedings. Counsel for the judgment creditor had made it clear that they were not admitting ownership or consenting to the goods being returned to the plaintiff. What they did was to withdraw from the proceedings and thereby relieve the bailiff from detaining the goods any further. These contentions have been noted in the record of proceedings and are consistent with the order of the Court. The circumstances as to how the goods got into the hands of the plaintiff instead of the Harga Sawmill are matters for the bailiff to explain in a proper trial.

To my mind this is not one of those type of uncontestable suits to which O. 14 applies. It is the prevailing practice in O. 14 application for the Courts to allow the defendant unconditional leave to defend unless the plaintiff can ostensibly demonstrate to the Court that the defendant has substantially no factual or legal issues which if properly raised at the trial, may constitute a defence. All the defendant need do to restrain an O. 14 application is to raise a reasonable issue as to fact or law that the plaintiff is entitled to judgment. See *Jacobs v. Booth Distillatory Company* [1901] 85 LT 262. This principle has again been lucidly expressed by Chang Min Tat FJ (as he then was) in *Syarikat Bunga Raya Timor Jauh Sdn. Bhd. v. Tractors Malaysia Bhd.* [1980] 2 MLJ 127 at 129 in which His Lordship said:

> The general principle in an O. 14 application is that leave to defend must be given unless it is clear that there is no real substantial question to be tried, that there is no dispute as to facts or law which raised a reasonable doubt that the plaintiff is entitled to judgment: at p. 263. Where the question of law raised is a difficult one, leave to defend should be given. But if the point is clear and the Court is satisfied that it is really unarguable, leave to defend will be refused: 1976 Supreme Court Practice 140, under the rubric "Question of Law." Therefore if the Court is satisfied that the defence or defence objection is unarguable, it must refuse leave to defend; anything short of that must merit unconditional leave to defend.

I am satisfied from the evidence before me that the defendant had successfully raised not only arguable issues which could be properly determined at a full trial but has also demonstrated that if they succeed in establishing some of the matters raised they will be able to put up a validly good defence.

The defendant is hereby granted unconditional leave to defend. The cost of this application shall be cost in the cause.

Also found at [1984] 1 CLJ 390